

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D349/2006

CATCHWORDS

Domestic building, variations, architect-administered contract where architect resigned and not replaced, variation reasonably foreseeable at date of contract, interest under contract where contract terminated before interest due

APPLICANT	Bogdan Konko
RESPONDENTS	Phillip Kamay, Julia Kamay
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	27 - 30 November and 1 December 2006
DATE OF ORDER	21 March 2007
CITATION	Konko v Kamay (Domestic Building) [2007] VCAT 524

ORDER

- 1 The Applicant must arrange for his electrician to return to site at a time mutually convenient to the parties but not later than 24 April 2007 to undertake the works necessary to leave the ceiling space in a condition which complies with the electrician's obligations when issuing a certificate of electrical compliance. Failing agreement as to a time to undertake the work, the Applicant may arrange to have the work done during business hours on not less than five business days' written notice. If the work is not undertaken by 24 April 2007 there is leave for the Respondents to apply to the Tribunal to seek compensation for the cost of this work. Both parties have leave to apply on the question of access.
- 2 The Respondents must make the first set of windows available for collection by the Applicant at a mutually convenient time. Failing agreement, the Applicant may collect these windows during business hours on not less than five business days' written notice by 24 April 2007. Should the Applicant fail to make arrangements to collect the windows by this date, the Respondents shall be entitled to dispose of windows as they see fit.

- 3 The Principal Registrar is directed to make the kitchen cupboard doors, which are exhibit A10, available to the Respondents for collection.
- 4 The Respondents must pay the Applicant \$1,138.71 forthwith.
- 5 Costs and interest other than interest under the contract are reserved and there is liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant

Mr D. Pumpa of Counsel

Witnesses:

The Applicant

Mei Yong Zhang (wife of the Applicant)

Mr Croucher

Mr Syzmanski

Mr Manz

For the Respondents

Mr A. Beck-Godoy of Counsel

Witnesses:

The Respondents

Mr Thompson

REASONS

- 1 The Applicant is a Builder (“Builder”) and the Respondents (“Owners”) own a home at 69 Banksia Street Eaglemont (“the home”).
- 2 On or about 6 September 2004 the Builder and Owners entered a building contract (“the contract”) for alterations and additions to the home. The contract sum was \$206,800.00 inclusive of GST and the work was to be brought to practical completion by 10 December 2004, subject to time adjustments under the contract. The standard-form contract used was ABIC SW1 which contemplates that the works will be administered by an architect. The architect named in the contract was Manz Pty Ltd.

CONTRACT SUM

- 3 I have been assisted by the partial calculations of both parties. The Builder’s related to sums due under the contract, omitting any amount for rectification, and the Owners provided a document in the nature of a Scott schedule, for rectification only. The Owner’s Points of Counter-claim had provided a good start, but was incomplete. I would have been further assisted if both parties’ calculations had dealt with all items.
- 4 The parties agree that the amount paid was \$166,006.45.
- 5 In the Builder’s Points of Claim it was stated that the contract sum was adjusted during the course of the contract to \$223,001.00. It is unclear how the Builder reached this figure. I rely instead on the Builder’s claim of \$27,516.00 plus \$5,170.00 cash retention; a total of \$32,686.00. The Builder’s calculations were in a document handed up by Mr Pumpa of Counsel for the Builder, and it appears to be based on the Builder’s tax invoice number 24 of 10 June 2005, which it updated.
- 6 The latter document, amended where indicated, is as follows:

Description	Value	GST	Price
Total work to date	\$188,000	\$18,000	\$206,800.00
Less: Painting deduction			\$15,436.00 ¹
Cash retention 5%			\$5,170.00
Assessed amount			\$1,390.00
Contingency sum			\$5,000.00
Door hardware			\$1,650.00
Amount previously paid			\$166,006.45
Subtotal			\$12,147.55¹

¹ These amounts differ from the original as the Builder had indicated that the painting deduction was \$15,500.00, which was inaccurate.

Plus: Extras as per agreement			
Invoice 22 [these were variations certified by the architect and are not in dispute]			\$7,686.25
Installation cost (kitchen floor)	\$800.00	\$80.00	\$880.00
Computer cabling	\$690.00	\$69.00	\$759.00
Extra plumbing services	\$400.00	\$40.00	\$440.00
Polish floor in study and corridor	\$450.00	\$45.00	\$495.00
Extra trellis to fence	\$395.00	\$39.50	\$434.50
Extension to retaining wall	\$420.00	\$42.00	\$462.00
Installation of picture rail in corridor and laundry	\$138.00	\$13.80	\$141.80
Subtotal [plus\$12,147.55]			\$23,445.60¹
Plus Variance in purchased specific items	Allowance (incl. GST)	Actual	Adjustment
Kitchen bench tops	\$3,300.00	\$4,070.00	\$770.00
Joinery-shop built	\$3,300.00	\$5,021.50	\$1,721.50
Shower screen doors	\$869.00	\$1,870.00	\$938.00
Gold-plated floor wastes instead of stainless steel			\$176.00
Solid plastering to existing			\$528.00
Total amount owed 10/6/2005			\$27,579.10¹

- 7 When the cash retention is added back in, the total is \$32,749.10, plus interest and costs, which I treat as the Builder's claim, taking into account the correct sum for painting deduction.
- 8 The Owners agreed that the contract sum was adjusted but said in their Points of Defence and Counter-claim that the final contract sum was

\$214,486.25, which is the original contract sum plus the variations allowed by the architect.

- 9 The Owners' net claim is for \$4,509.81 plus costs. The claim is calculated by deducting the claimed costs of defects and omissions of \$37,553.61 from the adjusted contract price, giving a total of \$161,496.64. That sum is then deducted from the amount paid of \$166,006.25.

VARIATIONS

- 10 Both parties accept that the variations allowed by the architect totalled \$7,686.25. It is also agreed by both parties that the Owners took over painting and that \$15,436.00 should be credited to the Owners for this item.
- 11 The architect resigned from the job after issue of progress certificate number 7 and no architect was appointed in his stead. The builder claimed extras after the architect's resignation, which are discussed below. With the exception of adjustments to prime cost or provisional sum items, I treat all as variations.
- 12 The parties agree that these extras were not in writing. Clauses J1 and J2 contemplated the manner in which variations would be dealt with under the contract. The relevant J1 and J2 are the "Special conditions - Housing in Victoria". They commence with A11, which is an acknowledgement that the contract imposes more onerous obligations than are imposed by the *Domestic Building Contracts Act 1995* ("DBC Act"). In particular, all variations instructed in writing by the architect which will result in an adjustment to the contract price require the builder to provide written advice regarding the cost of the variation. Under J2.4, the builder is not entitled to any adjustment to the contract unless instructed to proceed after the architect has received written advice concerning cost.
- 13 As there was no architect at the relevant time, I find that sections 37 and 38 of the DBC Act govern the relationship between the parties. The relevant parts are:

37. Variation of plans or specifications—by builder

- (1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that—

...

- (e) states the cost of the variation and the effect it will have on the contract price.

- (2) A builder must not give effect to any variation unless—

- (a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by subsection (1);

...

- (3) A builder is not entitled to recover any money in respect of a variation unless—
 - (a) the builder—
 - (i) has complied with this section; and
 - (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or
 - (b) the Tribunal is satisfied—
 - (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
 - (ii) that it would not be unfair to the building owner for the builder to recover the money.

...

38. Variation of plans or specifications—by building owner

- (1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.
- (2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.

...

- (6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—
 - (a) the builder has complied with this section; or
 - (b) the Tribunal is satisfied—
 - (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
 - (ii) that it would not be unfair to the building owner for the builder to recover the money.

14 Builders who undertake any variation which is not in writing and signed by both parties take the risk that they will not be paid. All variations requested by builders should be in writing. It is noted that in *Pratley v Racine* [2004] VCAT 203, Senior Member Young did allow two variations requested by the builder where the variation and the cost had been discussed with the owners.

15 Variations requested by owners must also be in writing in accordance with s38(1) of the DBC Act, and the builder must give notice of the cost and

effect of the variation before proceeding unless it is less than 2% of the original contract price. In these proceedings that sum is \$4,136.00 and each item claimed is less than that amount. Those additional claimed variations are as follows:

Installation cost (kitchen floor) \$880.00

- 16 This variation was to install a new kitchen floor over the existing one. The Builder claimed in his witness statement that he was instructed by the architect regarding the timber floor and in response provided a quotation. The quotation was for \$860.00 which is allowed.

Computer Cabling \$759.00

- 17 At paragraph 61 of his witness statement the Builder said “The computer cabling has been discussed with the Owners and the architect along with me and the electrician. The cost that has been charged is from the invoice I received from the electrician”. The Builder did not suggest that the cost was agreed and under cross-examination, the electrician, Mr Andrew Szymanski agreed that there was no agreement regarding price for this item.
- 18 In her witness statement, Mrs Kamay said:

The electrician’s initial works included placing the required wiring into the wall cavities while they were exposed. Andrew, the electrician told me that it was so much easier to place wiring at this stage of construction. He asked me if I was considering installing internet wiring at any stage. I mentioned that [we] were thinking about engaging our own electrician to install internet wiring. Andrew mentioned to me that he was able to perform that task while he was installing the other wiring. I asked him what cost that would be and he answered nothing because it was easy. Given this response I asked him to go ahead and I thanked him. Later when [the Builder] presented his final bill I noticed an amount for the above internet and wiring installation. ... The charges seemed extremely high and we had notified our electrician as to whether he could give us a quote [sic] on installation of such wiring and there was a huge discrepancy between our quote and [the Builder’s] charge.

- 19 Mr Szymansk said Mrs Kamay asked first about telephone lines and internet cabling and responded it was cheaper to install both at frame stage.
- 20 Mrs Kamay’s evidence in this respect is difficult, but not impossible, to believe. It is indeed surprising that the electrician would volunteer to provide cable without charge, and while there was mention of a “discrepancy” between the invoice received and “our quote”, the quote was neither provided in evidence, nor does the sentence make it clear the quote had actually been obtained.
- 21 Regardless of my reservations regarding Mrs Kamay’s evidence, the DBC Act is drafted as it is precisely to avoid the problems the parties now find themselves in. There are no special circumstances and the potential

injustice to the Builder does not outweigh the potential injustice to the Owners. The Builder is not entitled to any amount for this item.

Extra plumbing services \$440.00

- 22 The Builder said in his witness statement “The extra plumbing services were discussed between the architect, owners, me and the plumber and the plumber provided a quote”, but he did not exhibit the quote or an invoice from the plumber and the Owners have not admitted liability for this sum. There is no allowance for extra plumbing services.

Polish floor for study room and corridor \$495.00

- 23 The Builder said in his witness statement: “Polishing of the floor to the study room and corridor was discussed with the architect, owners and me. The cost of the work was advised to the architect and owners and approval was given for the work to go ahead”. It is accepted that the work was done and the sum is reasonable. The Owners must allow the Builder \$495.00 for this item.

Extra trellis to whole fence (in addition to plan) \$434.50

- 24 The Builder said in his witness statement that Mr Kamay asked for trellis for the whole length of the fence, rather than just in front of the bedroom windows. He said “he asked me how much extra it would cost. The charge that I have made for the extra trellis is the cost of the material and the labour to install and collect the material”.
- 25 The Builder said in his witness statement “The site plan sets out that there is to be a 1600 high paling fence with 300 high trellises added to the top in front of the bedroom windows.” While I am satisfied that the trellis is not just in front of the windows, I have not been provided with a copy of the site plan and the Owners have not admitted this item. There is no allowance for it.

Extension to retaining wall \$462.00

- 26 The Builder said in his witness statement “The extension to the retaining wall was discussed with Mr Kamay as the architect was no longer involved with the job at this time. There was an extra 3 lengths of sleeper and extra galvanised posts required. I gave an estimate of the cost to Mr Kamay that it would cost less than \$500.00 to extend the remaining wall”.
- 27 The Owners did not contradict the Builder’s evidence on this item and must allow \$462.00 for it.

Installation of picture railing in corridor and laundry \$141.80

- 28 The builder said in his witness statement the plans did not include picture railings in the corridor and laundry, but Mr Kamay asked why it hadn’t been installed. The Builder said he explained his view and submitted a price to Mr Kamay, who told him to go ahead.

29 Under cross examination the Builder abandoned this claim.

Joinery – Shop Built

- 30 The Builder has claimed an additional \$1,721.50 for this item as the excess spent over the allowance of \$3,300.00. It is noted that there are no provisional sums allowed and the only prime cost items listed in Schedule 7 to the contract are \$1,650.00 inclusive of GST for the door hardware and \$3,300.00 for kitchen bench tops. The Builder said in his witness statement that “the extra charge for shop built joinery comes from a better standard joinery having been constructed and changes to an appliance cabinet”. Under cross-examination he said that Mrs Kamay went with him to visit the joinery manufacturer and agreed to pay extra, but he did not get a variation in writing. When asked if he knew his obligations concerning variations in writing, he answered “I now know”.
- 31 He has not provided a basis upon which he has an entitlement to this item and there is no allowance for it.

Shower screen doors

- 32 The Builder has claimed an additional \$938.00 for this item as the excess spent over the allowance of \$869.00. He stated that the Owners selected more expensive screens than were allowed for, however as noted above, this item was neither a provisional sum nor prime cost allowance. There is no indication that the Builder informed the Owners that they were not entitled to choose the selected screens, or that they indicated they were willing to pay more. The Builder has not provided a basis upon which he has an entitlement to this item and there is no allowance for it.

Gold plated floor wastes instead of stainless steel

- 33 The Builder has claimed \$176 for this item. Although the original claim was for gold plated floor wastes, the Builder admitted in his witness statement that the floor wastes are brass and asserted without proof that they cost more than stainless steel. Further, in section 10185 of the specification, hardware is to be stainless steel or brass. The Builder has not provided a basis upon which he has an entitlement to this item and there is no allowance for it.

Solid plastering to existing

- 34 The Builder has claimed a variation of \$528.00 for replacement of the solid plaster in the bathroom which the Owners say should have been an item contemplated by the Builder when quoting for the job and therefore should not have been claimed as a variation. Both experts agreed during the expert conclave that in most cases a Builder should allow for replacement of solid plaster beneath tiles. Given that a variation can only be claimed by a Builder under s37 of the DBC Act when the item claimed is not reasonably

foreseeable to the Builder at the time the contract is signed, and this item is reasonably foreseeable, there is no allowance.

ADJUSTMENTS TO PRIME COST SUMS

- 35 The parties agree that the allowance for door hardware, being \$1,650.00 inclusive of GST, is to be deducted from the amount payable to the Builder. The Builder has also claimed an additional \$770.00 for the extra cost of kitchen bench tops over the allowance of \$3,300.00
- 36 At paragraph 14 of his witness statement the Builder said that “the cost of the granite bench tops was noted to be \$3,400 + GST being \$400 over the PC sum.” The architect’s Site Meeting Notes 3 confirms this. At paragraph 67 he said that granite “was selected” – by whom is not stated – and that the actual cost of the stone was \$4,070.00.
- 37 In accordance with the architect’s Site Meeting Notes 3, the Builder is entitled to a prime cost adjustment of \$440.00 for the kitchen bench top.

LIST OF 20 JUNE 2005

- 38 In his Points of Claim the Builder said that a list was provided by the Owners on or about 20 June 2005. The items on the list were: Installation of antenna, fly screen fit out, perform pest control spray around house, repaint ceiling – due to slight colour variance after repairs and paint the Colorbond down-pipe.
- 39 The Builder did not admit that the “works were required to complete the contract”, but said he agreed to do the works to ensure payments of the balance of the contract sum. He said that he arranged for contractors to attend the home on 22 June 2005 and contacted Mr Kamay on 21 June 2005 to advise that the work would be carried out the next day. He said Mr Kamay first agreed to the work being done, but later the same day contacted the Builder to say that the Builder could not have access to complete these items.
- 40 Mr Kamay said at paragraphs 57 and 58 of his witness statement:

On or about the 20 June 2005, I received a phone call from Konko’s wife, Mei, who indicated that they wanted to finish the job and be paid for it. She said that she would organize for all the work that was needed to be done on the 22 June 2005. I was not satisfied with this proposal, that a painter, a plasterer, a TV antenna service man, a termite exterminator and a fly wire screen fitter were all to attend the Property and complete the outstanding items in one day.

I discussed the proposal with my wife, and we contacted Mei and advised her that we had decided that we were not satisfied with the proposal, especially given the very poor attitude and aggressive frame of mind that Konko had exhibited at our last meeting. I was concerned that things would be rushed, shortcuts would be taken, things would be left incomplete or other damage would occur to the

Property. I was not prepared to take this risk, as I wanted the final rectification to be a planned and fully co-ordinated exercise.

- 41 Ms Zhang (the wife of Mr Konko) agreed that she had telephoned Mr Kamay on or about 20 June 2005 and said he agreed the Builder could carry out the work. She said Mr Kamay rang back at about 5.30 p.m. the same day, denying permission to attend site.
- 42 It is regrettable that the Owners did not allow the Builder access to the site as it might have reduced the extent of the dispute. However I also accept Mr Kamay's evidence that the relationship between the parties had broken down by this stage, particularly over the adequacy of the first set of windows.

Installation of antenna

- 43 The Owners claimed \$240.00 for the installation of an external television antenna. It is accepted that the Builder had been willing to undertake this work, however I accept his evidence that no antenna was described in the specification. The specification includes the somewhat enigmatic "Included in contract" against television antenna. I find that \$240.00 is a modest amount for this item and no evidence has been put by the Builder as to any other amount. The Builder must allow the Owners \$240.00 for this item.

Fly screen fit out

- 44 The Owners claimed \$528.00 to purchase fly screens. The Builder said in his witness statement "I was aware of the requirement to have flywire screens fitted ..." The Builder must allow the Owners \$528.00 for this item.

Termite spray

- 45 In the document approximating a Scott Schedule handed up for the Owners, Mr Thompson described this item as "termite protection in lieu of ant caps" and priced it at \$200.00. I accept that termite protection is necessary if ant caps are missing and note the Builder's admission in cross-examination that they are. I find that \$200.00 is a reasonable sum for an independent pest contractor to charge a builder. The Builder must allow the Owners \$200.00 for this item.

Repaint ceiling

- 46 No evidence has been provided by the Owners as to this item, unless the ceiling referred to is the ceiling in bedroom 1 which is discussed below. The Builder said in his witness statement that he agreed to do this item while maintaining that it was not his responsibility. No other sum is allowed for this item.

Paint Colorbond downpipe

- 47 At paragraph 36 of the Counter-claim, item 21, there is an item "repaint external down-pipes damaged during pressure cleaning by Builder" and the

amount of \$250.00 is sought. No evidence was given by the Owners and it is not referred to in the Owners' Scott Schedule. There is no allowance for this item.

ALLEGED DEFECTS OR INCOMPLETE WORKS

48 The following alleged defects or alleged incomplete works are listed in accordance with the numbering used by the Builder's expert, Mr Croucher of Buildspect and the Respondent's expert Mr Thompson of Anywhere Building Consultant. Concurrent evidence was given by the experts in conclave, and I am grateful to them for their cooperation in simplifying and expediting the hearing.

Schedule 1

Item 1 – Insulation, ceiling and walls

49 The parties agree that Greenstuff insulation was substituted for specified Bradford Gold batts. There is no loss, as the experts agreed that Bradford batts have the same R rating as Greenstuff, although the specification stated incorrectly that Gold batts have a thermal rating of R3.5.

50 Both experts agreed that some work was necessary to re-arrange the batts within the roof space. Mr Thompson allowed \$198.00 and Mr Croucher allowed \$183.00. The Builder must allow the Owners \$190.00 for this item.

Item 2 – External laundry door jamb

51 The experts agree that the door jamb has been installed slightly out of plumb and the lock striker side will require straightening to enable the door to close flush and also to minimise the gap on the striker side. Mr Thompson allowed \$338.25 and Mr Croucher allowed \$226.00. Mr Croucher's evidence is preferred for this item. The Builder must allow the Owners \$226.00.

Item 3 – Laundry window

52 The experts agree that the window will not open. Mr Thompson allowed \$239.25 and Mr Croucher allowed \$190.00. Mr Thompson's evidence is preferred for this item, particularly as the painter will need to apply at least two coats of paint to the area that has been stuck, allowing drying and clean-up time between each. The Builder must allow the Owners \$239.25.

Item 4 – Door stops

53 The experts agree that the new wall adjacent to the dining room is out of plumb with the result that the doors tend to slowly swing shut. The experts agree that the door hinges require adjustment and that then the door stops would be reset. Mr Thompson allowed \$478.50 and Mr Croucher allowed

\$133.00. Mr Thompson's evidence is preferred for this item. The Builder must allow the Owners \$478.50.

Item 5 – Kitchen bench top

54 The parties have agreed that the bench top is acceptable.

Item 6 – Solid plaster

55 This item has been dealt with under variations above.

Item 7 – Timber floor

Floor level from kitchen to passage and kitchen to dining room

56 Mr Thompson's report states that there is a difference in height between the floor of the kitchen and the existing floors to the passage and dining room. In 7.3 of his report he also mentioned that the floor surface shows a small number of openings between the floor boards which are within tolerances and there is one area which he describes as being in the vicinity of the kitchen bench but is most likely where an old wall was removed where there has been a gap between floor boards extensively filled with wood putty. The gap is approximately a centimetre wide and about 20 centimetres long. Mr Thompson has priced removal and relaying of the floor with a consequent need to remove and replace the wall unit and skirtings to the northern side of the kitchen and to sand and polish the new floor at \$3,641.47.

57 Mr Croucher did not price the kitchen floor in his report of 14 November 2006, but made calculations in the course of the hearing and said the cost of rectification of the filled board (including consequent re-polishing) would be \$544.50. Mr Thompson allowed more pieces of new board and more time and calculated \$653.13. Despite the precise numbers, both calculations were done on the spot in the hearing room. The accurate sum is probably between the two.

58 With the exception of the filled gap mentioned above, the over-all appearance of the kitchen floor is good. There is a small step, but it appears to be neither dangerous nor unsightly. In fact, the difference in quality between the old floor, which contains significant gaps, and the new which does not, would appear more of a mismatch if the floors were absolutely level. The Owners are not entitled to the cost of replacement of the floor, but are entitled to the cost of rectification for which I allow \$600.00.

Dust particles alleged to be in floor of bedroom 2 & 3 passage

59 Mr Thompson reported that there were dust particles in the polish to this passage. Mr Croucher reported that any dust particles in these areas were considered normal and my attention was not drawn to this while on site. There is no allowance for this item.

Item 8 – Bathroom 2

- 60 It is agreed by the parties that, at the suggestion of the Builder, the precast shower base that was used in bathroom 2 was deleted and substituted with a tiled floor. The parties agree that there was some ponding in this area and that the Builder attempted to rectify. The Owners said that the result achieved by the Builder after rectification was still inadequate and that water continued to splash out into the main bathroom. It was their evidence that they have paid Complete Plumbing Service \$2,420.00 to rectify this item.
- 61 Mr Kamay's witness statement made reference to the invoice of Complete Plumbing Service as Respondent's discovered document No 13, but no copy of the invoice was provided to me and no further information was provided about what work was undertaken.
- 62 The Builder's witness statement said that the Owners only needed a lower flow shower head to rectify the problem. He repeated this in answer to a question in cross-examination, and said that there had been a problem with ponding that had been rectified by him.
- 63 Mr Thompson agreed under cross-examination that he had not seen the shower base when defective and had not considered whether the amount alleged to have been paid by the Owners was reasonable. He said that his report on this item merely transcribed what another expert for the Owners, Mr Hay, had said. Mr Hay's report stated that there was no fall to the floor waste. Photographs 7 and 8 of Mr Hay's report of 28 October 2005 are of a spirit level on the bathroom floor with the bubble in the middle, indicating that the floor was level. However it is noted that the spirit level was placed outside the shower cubicle, with one end of the spirit level projecting into the cubicle for a distance of between 100 and 150 mm.
- 64 In the absence of further evidence the Owners have failed to prove that work was necessary to the bathroom floor and no amount is allowed for this item.

Item 9 – Bathroom 1

- 65 The experts agree that a floor waste to bathroom 1 had not been connected to any drainage and required connection. Mr Thompson's evidence is that the cost of doing so is \$970.20 and Mr Croucher's evidence is that the cost of doing so is \$810.00. Mr Thompson's evidence is preferred for this item. The Builder must allow the Owners \$970.20.

Item 10 – Plaster above door into hall

- 66 The experts agree that two plaster sheets have been joined above the door from the family room into the hall and that this is not good building practice. The outcome is a hairline crack which needs to be taped, filled and painted. The painting may require the whole wall to be repainted if it cannot be touched up without being obvious. Mr Thompson has allowed

\$391.32 for this item and Mr Croucher has allowed \$147.00. Mr Thompson assumes that the work will need to be done by a plasterer and as there is no other plastering work in the rectification work there will be a minimum charge of \$100.00 added to the 3 hours that he has allowed. On this item, Mr Croucher's calculation of 2 hours for labour is accepted and his evidence is accepted that the work can be done by a painter rather than a plasterer and a painter. His calculation is accepted and \$147.00 is allowed.

Item 11 – Ceiling to bedroom 1

- 67 Neither expert was able to provide compelling evidence regarding the extent of repairs necessary as the cracks to the ceiling have since been repaired. The Owners' claim is for \$1,000.00 for this work and appears in the particulars of Counterclaim. Mr Kamay's evidence is accepted that some plaster sheets were replaced by the Builder after his insulation installer put a foot through the bedroom ceiling.
- 68 Mr Croucher estimated that if it was necessary to repair the master bedroom alone and half the ceiling was affected the cost to repair and repaint would be in the region of \$963.00. Mr Thompson agreed with his figure. Mr Croucher said that if half the lounge room ceiling required repair the cost would be in the region of \$1,045.00. The Owners' evidence that they have paid \$1,000.00 for this item is accepted as reasonable and this amount is allowed.

Item 12 – Specified plaster sheeting

- 69 The experts agree that the specification called for 13mm plaster sheeting and that 10mm plaster board was installed. They also agree that the difference in value between the plaster sheeting would be in the region of \$452.00. The Builder's evidence is accepted that the walls are competently built because the architect agreed that they could be fixed at 450mm rather than 600mm centres, however as there is no variation allowing change of board, the Builder must allow the Owners \$452.00 for this item.

Item 13 – Kitchen cupboards

- 70 The Owners claim that the kitchen cupboards do not match the specification as the specification called for 20 mm Baltic pine doors to the cupboards to match existing. Mr Thompson's report was that the existing cupboards were of radiata pine as are the new cupboards, however on the third day of the hearing after visiting the site he admitted that he was mistaken and that the existing cupboards were of Baltic pine and the new ones of radiata.
- 71 There is an obvious mismatch between the existing cupboards and the new ones and I find that the Owners were entitled to matching cupboards. In conclave Mr Thompson said that he thought the doors, drawer fronts and end panels could be replaced for \$1,762.00 excluding the roller door on the utilities hutch. His report assessed the whole job at \$3,707.55. Mr Croucher said that the job excluding the roller door would be approximately

\$496.00 and his “stab in the dark” figure for the roller was another \$495.00. I prefer Mr Thompson’s report for this item. The Builder must allow the Owners \$3,707.55 for this item.

- 72 It is noted that the Builder provided two doors from the Owners’ previous kitchen as evidence, tendered as A10. The parties agreed that the doors had been provided to the Builder by the Owners for the purpose of matching. The Principal Registrar is directed to make the doors available to the Owners for collection.

Items 14 & 15

- 73 The parties agree that there is no allowance for these items.

Item 16 – External side entrance door frame

- 74 The experts agreed that the northern side of the door frame to the east side of the house requires rectification to eliminate a gap between the frame and the brick wall which ranges between 8 and 10mm wide. Mr Thompson also reported that there are marks on the pine stud which is being used as part of the external door frame. Mr Thompson’s recommendation for rectification calls for a timber cover to be scribed into the brickwork leaving a quirk on the door jamb, at the cost of \$207.46. Mr Thompson recommended supply and installation, painting and making good of a 19mm quad mould at the cost of \$107.00.

- 75 Mr Thompson’s method is preferred and \$207.46 is allowed.

Item 17 – Sub floor ventilation

- 76 At the third day of the hearing the experts agreed that the sub floor ventilation is adequate and no further work is required.

Item 18 – Perpend

- 77 The experts also agreed that no work is required to the perpend.

Item 19 – Wall oven

- 78 The experts agreed that the wall oven needs to be readily removable and is not at present. Mr Thompson gave evidence that the necessary work would cost \$253.00 and Mr Croucher said \$220.00. Mr Thompson’s evidence is preferred. The Builder must allow the Owners \$253.00 for this item.

Item 20 – Roof area

- 79 The experts agreed that if the work to undertake flashing to the roof area above the kitchen wall was necessary, the charge of \$75.63 by Rob Ferris Electrics was reasonable. Having viewed photographs I find that this work was necessary and the Builder must allow the Owners \$75.63 for this item.

Schedule 2

3.2 Flashing of roof over laundry

- 80 Mr Thompson agreed that the amount of \$264.00 included in his expert report was derived entirely from a bill which the Owners say they paid to Complete Plumbing Services to rectify a roof leak. Mr Croucher was unable to contribute except to say that there was clearly new step flashing installed and lead to the valley iron. Mr Thompson admitted that he did not investigate the alleged defect any further because the Owners informed him that the leaking had been rectified and he was unable to say whether there was a possibility of further leaks in that area.
- 81 It is accepted that the work was necessary and the price reasonable. The Builder must allow the Owners \$264.00 for this item.

Item 4 – Damage to spouting

- 82 Mr Thompson's evidence in his report was that it was likely that "30-40 lineal metres" of spouting had been damaged by acid overspray from brick cleaning. It is noted that the photographs of the spouting along the northern wall and around the bay window accurately reflect the condition on site which indicate that the paint on significant lengths of the spouting is breaking down and the zinc beneath the paint is oxidising.
- 83 It is not clear that the damage demonstrated to the spouting was necessarily caused by acid overspray. Mr Croucher's evidence is accepted that in his experience there have been problems with Colourbond spouting breaking down, however the Colourbond spouting was provided by the Builder and it is not reasonable that the material should have broken down within two years of completion of the Builder's work. As between the Owners and the Builder, the Builder is responsible for this item.
- 84 Mr Thompson included the sum of \$3,421.00 in his report whereas Mr Croucher gave evidence in his report that 26.5 metres of spouting could be replaced at the sum of \$1,612.00. Mr Croucher's evidence is preferred for this item and the amount of \$1,612.00 is allowed.

Schedule 3

Item 1 – Electrical items in roof/ceiling space

- 85 Mr Thompson's evidence is accepted that electrical wires are not sufficiently clipped down to avoid the possibility of a tripping hazard for anyone who is working in the ceiling space and that the parts of the wires which protrude from a junction box are not double insulated. This was confirmed by the Builder's electrician, Mr Andrew Szymanski, who gave evidence on behalf of the Builder. While Mr Szymanski gave evidence that the wires must have been dislodged by someone else and that they were in place when he finished his work, his evidence was unconvincing. It is noted that Mr Szymanski is willing to visit the Owners' home at a mutually

convenient time to clip down the electrical wires and to ensure that the insulation complies with the obligations of an electrician issuing a certificate of compliance.

- 86 Mr Szymanski suggested that some of the wiring might have been undertaken by the airconditioning company which was engaged by the Owners and also that some of the cables in Mr Thompson's photograph number 5 appear to be either computer network or television aerial cables. He said that they are low voltage and do not have to be clipped down as power cables do.
- 87 In the course of the hearing I suggested that an appropriate order regarding this item could be that the Builder arrange for his electrician to return to site at a mutually convenient time to the parties but not later than one month after the publication of this decision to undertake the works necessary to leave the ceiling space in a condition which complies with the electrician's obligations when issuing a certificate of electrical compliance. If the work is not undertaken within one month there is leave to the Owners to apply to the Tribunal to seek compensation for the cost of this work.
- 88 There having been no further submission regarding this proposal the order is made in those terms.

Item 2 – Rangehood

- 89 The experts agree that the rangehood is out of level and requires adjustment. Mr Croucher's estimate is \$146.00 and Mr Thompson's is \$634.91 which includes removal and replacement of the duct. At present the rangehood is ducted into the ceiling space and the duct material used is flexible ducting, such as is commonly used for ducted heating and air-conditioning. The Owners did not provide any evidence that the contract contemplated ducting to the outside air and neither did they provide proof that the Builder was provided with the installation instructions. I am satisfied that the installation instructions said in part "for ducting installation we recommend using galvanised or similar metal type flue pipe. PVC is not recommended". The duct pipe used is 2 skins of aluminium reinforced with spiral wire.
- 90 Mr Croucher gave evidence that this kind of ducting is acceptable for rangehoods and that kits are available which include ducting of this nature. In addition to the amount allowed by him I also allow for replacement of the existing duct as I am satisfied with Mr Thompson's evidence that there is a breach of the duct near the area where it enters the ceiling space.
- 91 The amount allowed for this item is \$146.00 in accordance with Mr Croucher's report plus the cost of the kit at \$60.00, one hour's time for an electrician at \$55.00, being a total of \$115.00 plus a contingency of \$12.00, a margin of \$13.00 and GST of \$14.00 being a total of \$154.00. The grand total for this item is \$300.00.

Item 3 – Kitchen cupboard doors and end panels

92 As I have ordered that these doors are to be replaced, this item becomes redundant.

Item 4 – Kitchen benchtop around sink (wet area)

93 The experts agreed that the benchtop/wall intersection requires removal and reinstallation of sealant. Mr Thompson's opinion is that the cost is \$75.00. Mr Croucher has allowed \$75.00 but also a contingency, margin and GST and I prefer his evidence for this item. The Builder must allow the Owners \$100.00 for this item.

Item 5 – Provisional extra – soundproofing to bedroom 2

94 Mr Thompson said in his report that upon removing a roof tile to inspect the insulation to bedroom 2 walls it was identified that Autex 3R polyester batts had been used instead of an acoustic batt. The subject bedroom is occupied by one of the Owners' sons who plays the trumpet. The bedroom is subject to a variation. The variation is variation quotation request number 6 of 1 November 2004 which states:

“The cost to include “thermo-acoustic” batts in the bedroom 3 wall adjoining bedroom 2. Allow for acoustic sealant around all plasterboard sheets to fill any penetrations. It may be worth considering the extra cost of including acoustic seals around bedroom 3 door. It may also be worth considering allowing for 2 No. sheets of Gyprock Soundchek on the bedroom 3 side of the wall to replace the single sheet of 13mm plasterboard allowed in the contract”.

95 The quotation relevant to this instruction was provided by the Builder and was undated but also dealt with instructions number 7 & 8. An amount of \$263.45 was allowed for:

“Instruction no. 06

Installation of thermo-acoustic batts and extra layer of Gyprock Soundchek around bedroom 2 and bathroom”.

96 The experts had removed a general power outlet cover plate from a wall other than the wall between bedrooms 2 and 3 and agreed that poly batts were used rather than acoustic batts. They could not identify the batts in the walls between bedrooms 2 and 3. I am satisfied that the Owners have proved that part of the insulation around bedroom 2 was not acoustic batts and that the ceiling and all the walls of bedroom 2 should have been insulated with acoustic batts. The Builder's failure to install insulation in accordance with at least part of the variation indicates that it has been disregarded. The Owners are entitled to a refund of \$263.45 for this item.

Item 6 – Vanity cupboard to bathroom

97 Mr Thompson reported that the shelf to the vanity has been cut to go around a plumbing fitting and is unsightly. He allows \$488.60 for removal and

replacement of the shelf and the supply of a short “p” trap. Nothing is allowed by Mr Croucher for this item.

- 98 My own observation on site was that the cut in the shelf did not have the appearance of one which was undertaken by a tradesman of reasonable skill exercising reasonable care. The Builder must therefore compensate the Owners for the cost of a new shelf.
- 99 Mr Thompson’s evidence regarding the space available to install a short “p” trap was unconvincing, therefore it is accepted that the new shelf will need to be cut and no allowance is made for a new “p” trap. It was accepted in the hearing by all present that the shelf is removable.
- 100 The Builder must allow the Owners \$150.00 for the removal, manufacture and installation of a new shelf plus contingency of 10% being \$15.00 plus margin of 10% being \$17.00 plus GST of 10% being \$18.00, a total of \$200.00.

Item 7 – Brass strip to entry of bathroom

- 101 Both experts agreed that the brass strip between the passage wooden flooring and the bathroom floor tiles stands proud of both floors. The on-site inspection revealed that at the centre it is approximately 4mm higher than the wooden floor and 2mm higher than the tiled floor. It needs to be level with the tiled floor.
- 102 Mr Thompson has allowed \$115.50 to file or grind down the brass strip to an acceptable level. Mr Croucher allowed \$61.00, however he was of the opinion that it could be done by removing the strip. On site he realised that the brass strip is an L-section which cannot be removed without removing at least one line of tiles as well.
- 103 Mr Thompson’s solution is accepted. The Builder must allow the Owners \$115.50 for this item.

Item 8 – Rear door furniture

- 104 This item has been resolved.

Item 9 – Sash cords to bay window

- 105 Both experts agreed, and it was confirmed at the site inspection, that the sash cords of all the windows in the bay window carry both the green paint of the exterior colour to the windows and the brown stain used on the interior surfaces of the bay windows. When the windows are open it is possible to see the original colour of the sash cords, a creamy white, replete with paint splashes.
- 106 Both experts agree that the sash cords should be protected from paint and that cords which have paint splashes on them should be replaced. I was unconvinced by the evidence of Mr Thompson that the fact that the cords had paint on them would lessen their life expectancy, however I find that

this is not relevant as the cords needed to be replaced in any event. Mr Thompson and Mr Croucher allowed \$1,467.00 which is the amount quoted by Canterbury Windows.

- 107 There was evidence about which colour of paint appeared on the sash cords first and also about who was responsible for the work of the second painter who, it is accepted, was engaged and paid by the Owners. This is also irrelevant as I accept the evidence of Mrs Kamay that the first painting on site was done by the Builder's painter and included the staining of the interior of the bay windows.
- 108 The Builder must therefore allow the Owners \$1,467.00 for this item.

Item 10 – Tiles to rear porch

- 109 No tiles have been laid on the rear porch. It remains concrete. Mr Thompson's evidence was that the Owners had supplied floor tiles but the Builder had not laid them. Mr Croucher's evidence was that it was not clear that the Builder was obliged to lay tiles, however in his witness statement the Builder admitted that he was "aware of the requirement ... to complete some floor tiling".
- 110 Further, the architectural plan provided as Builder's Exhibit A3 headed "Proposed floor plan" shows: "New concrete porch slab" for the area in question. "Section 09300 Ceramic Tile" of the specific which appears on page 36 refers in scope of works to:

"Perform work described here and shown on drawings including but not limited to: Prepare surfaces to be tiled. Supply and install bedding as required. Wall tiles, floor tiles, external paving tiles.

Under "Materials to be used", there is the item "External tiles – client supplied". It would appear that it was the intention of the parties that some external tiling be undertaken. I am satisfied that the only area that could be tiled was the rear porch and I accept the evidence of both experts that the sum allowed by Mr Thompson is reasonable for the laying of this area of tiles. The Builder must allow the Owners \$255.75 for tiling.

Item 11 – Retaining wall

- 111 The retaining wall to the west of the property is constructed of railway sleepers and the cost to do so was \$1,980.00 plus GST. The order for construction is found in Variation V04. Unfortunately neither party has provided me with architect's instruction no. VQR 92 dated 18 September 2004 or the quotation for that work of 4 October 2004 which are referred to in the variation instruction. It was noted on site that one sleeper for the retaining wall was not level. Mr Thompson suggested that the supporting steel posts, which are "I" beams should be extended in height, that the sleeper should be replaced and holes drilled into the "I" beams and coach screws inserted to maintain the position of the sleepers. The amount he allowed was \$743.82.

112 Mr Croucher's evidence was that one sleeper could be replaced with a new one cut to suit at the cost of \$154.00. It was noted on site that if the sleepers were properly cut to fit "I" beams it would be unnecessary to provide further fixing to hold them in place. Mr Croucher's evidence is preferred. The Builder must allow the Owners \$154.00 for this item.

Item 12 – Excess mortar to side of brick wall

113 The experts agreed that the narrow side of a brick wall facing the neighbouring property on the west side of the house has not been properly cleaned and needs the mortar dags removed and the wall repointed. Mr Croucher provided evidence that the cost for this item was \$120.00, allowing for 2 hours' labour. Mr Thompson's evidence is that it would be \$165.00 as there would be a minimum charge of \$100.00 for a bricklayer to undertake this work.

114 As Item 13 also calls for the work of a bricklayer, the minimum charge is not applicable in this case and the Builder must allow the Owners \$120.00 for this item.

Item 13 – Sill tiles to bay window

115 Mr Thompson reported that:

“The sill tiles to this are out of level (undulating line). The tiles have also not been cut with a constant reduction to the rear of the tile as it goes around this bay window which is also unsightly”.

116 His proposed method to rectify is to remove the sill tiles, purchase new sill tiles, cut all tiles with equal reduction to the rear of the tile to enable them to be laid into the bay window. The cost estimated by him is \$1,536.98.

117 Mr Croucher said of this area:

“As the brickwork to the bay window is circular in form and each of the window sections forming the bay are straight, some difficulties will be encountered making the two faces blend satisfactorily.

This is in part due to the varying distances between the nose of the sill and the brickwork and therefore the varying lengths of sill tiles.

Minor undulations were noted, in particular in front of the angled cover boards.

He concluded that a satisfactory result could be achieved if the tiles with a slightly more pronounced dip were removed and relaid.

118 The overall impression of the sill to the bay window is pleasing. It is undoubtedly difficult work and on the whole appears to be the work of a competent tradesman competently done as distinct from work which has been poorly undertaken. Nevertheless, a spirit level laid across the sill tiles indicated that they are, to some degree, out of level and there is at least one tile which does not quite reach the bottom ledge of the windows. Mr Croucher's view was that the cost to rectify would be \$546.00.

119 I find that it is not reasonable to completely remove and replace the tiles but I also find that more work is necessary than rectifying only the tiles with a “pronounced dip”. In the circumstances the Builder must allow the Owners \$1,000.00 for this item.

Item 14 – Second window order from Canterbury Windows

120 The parties agree that the Owners rejected the first delivery of windows that were ordered and paid for by the Builder and that a second set of windows were obtained from Canterbury Windows at the Owners’ cost. The old windows were at the Owners’ home when I visited for the site inspection during the hearing.

121 It is noted that the second set of windows also do not perfectly match the previously existing windows or those drawn on the window schedule. For example, the horns are more elaborate than the simple rounded shape of the originals, but they do look as if they could have been in the old part of the house when it was built.

122 Mr Kamay’s evidence is accepted that the Builder did not check the proposed windows with the architect or Owners before confirming the order for the windows, but he has not demonstrated that there was any contractual obligation to do so.

123 The Builder said in his witness statement:

[the Architect] certified ... an assessed amount for set off claimed by the owners of \$1,290.01 for windows ...

I had Canterbury Windows manufacture the windows for the job. I provided Canterbury Windows with a copy of the drawings and specifications supplied by the architect. Canterbury Windows manufactured the windows in accordance with the details contained in the drawings.

...

When the windows were delivered to the site the owners did not like the windows that had been constructed by Canterbury Windows. Mrs Kamay did not like the fact that there was plastic on the windows encasing the double hung mechanism. ... The day after the windows were delivered I met with the architect and the owners. The architect apologised for the mistake in the windows as he had not properly specified what the owners had wanted. The owners appeared to think that the windows would match exactly the old windows. The windows did essentially match the old windows rather than the windows being a complete replica of the old windows.

Appearance of the windows

124 The window schedule provided by the architect and tendered during the hearing as Builder’s exhibit A4 depicted windows very similar to those delivered, although the part of the windows described by the Builder as

“plastic encasing the double hung mechanism” was not a view of the windows depicted on the drawings.

- 125 Section 08550 of the Specification dealt with timber windows and glazing and the relevant parts were as follows:

MATERIALS TO BE USED

Item	Description	Supplier
Frame: Timber	Size of jambs, sills etc	To match existing
Sashes	Sizes of sections	To match existing

- 126 Mr Manz, the architect, gave evidence for the Builder and did not admit that he had made a mistake regarding the windows. He prepared a report dated 16 November 2004 which said:

The timber windows as delivered do not match the existing windows in the details. They are correct in as much as they have the general appearance of double hung windows, and they would be acceptable if they were not seen in the context of **this** house.

- 127 I find that the windows should appear to be part of the original house, which was built around 1920 to 1930. The plastic on the windows makes it immediately obvious that the windows are not part of the original house. I find that the first set of windows did not comply with the requirements of the specification.

Allowance for the windows

- 128 As reported above, the Builder asserts that an allowance of \$1,290.01 has been made for the windows and that no further amount should be allowed. In accordance with the particulars to paragraph 36 of the Counter-claim, the Owners seek \$10,000.00 for the windows.

- 129 Mr Manz said in his witness statement:

With respect to the dispute about the windows the builder was to provide \$1,290 credit to the owners for Canterbury Winds as the owners were purchasing another batch of windows. I prepared handwritten notes of this meeting.

...

The windows that were eventually approved and supplied did provide a better match to the existing windows but were not a replica of the existing windows.

- 130 The note Mr Manz referred to is hand-written. The relevant parts are:

Site meeting 7 (BK/PK/DM) 04.12.04

...

\$1,290.01 credit BK to PK for Canterbury Windows

...

\$11,290 Canterbury Windows

131 The sum of \$1,290.01 also appeared in Progress certificate No. 7 of 5 January 2005 as “the assessed amount of a set-off of monies due, claimed by the owner, including any GST.” However under cross-examination for the Owners, Mr Manz said that he resigned his commission in January 2005 and the issue concerning the windows was not concluded by the time he resigned.

132 There was another relevant document, being the hand-written notes of Site meeting 5 dated 13 November 2005. The hand writing appears to be the same as for site meeting 7, but does not note who attended. The relevant part is:

- Windows:
- redrawn window schedule tabled
 - price for redrawn windows \$13,700
 - window- non-returnable
 - BK will accept responsibility for mistake with plastic sash system
 - 13 working days to construct
 - need to make decision on windows

Under cross-examination the Builder denied that he had said he would accept responsibility for the windows. He also said that Mrs Kamay put aside the report attributing blame to the Builder when she received it. He said the Owners agreed to a credit of only \$1,290.00 from him because they were going to recover the remaining \$10,000.00 from the architect.

133 Mr Kamay said in his witness statement:

The supply and delivery of the Second Windows was arranged at an additional cost to us of \$11,209.01. This sum has never been accounted for in any subsequent payment claim from Konko.

134 In re-examination the Builder said that document BK5 which is the typed notes of site meeting 5, accurately reflected what happened. Like many other documents in this dispute, it is enigmatic. Item 10 is: “Client issues” and the last bullet point states: “Delivered windows rejected and decision required on outcome” under the “Action” column, Mr Manz’s initials appear. I accept the evidence of Mr Kamay that the Builder was threatening to leave site unless the Owners accepted the original windows.

135 There is no evidence that the parties compromised the claim for windows and, despite the architect’s Progress Certificate 7, I find the issue of allowance for the second set of windows had not been resolved between them. Given that the new windows are not identical to the window schedule, I find that \$10,000.00 is a reasonable sum for the Builder to allow the Owners for this item, and I so order.

136 At paragraph 25 of his witness statement, Mr Kamay said he believed the first windows are properly regarded as the property of the Builder. I accept his reasoning and order that the Owners make the first set of windows

available for collection by the Builder at a mutually convenient time. Failing agreement, the Builder may collect these windows during business hours on not less than five business days' written notice by 24 April 2007. Should the Builder fail to make arrangements to collect the windows by this date, the Owners shall be entitled to dispose of windows as they see fit.

Item 15 – Non support to purlin over family room area

137 Both experts agree that work is necessary to rectify this purlin. Mr Thompson's opinion is that the cost is \$139.11. Mr Croucher's opinion is accepted that the cost to rectify is \$146.00. The Builder must allow the Owners \$146.00 for this item.

Item 16 – Gutter/downpipe above rear laundry area

138 Mr Thompson recommended that a rainhead and pop be installed to prevent the possibility of rainwater flowing back into the roof area during a heavy downpour. The evidence of Mr Croucher, as supported by the site inspection, is accepted that there are relief slots in the front of the spouting which fulfil the same purpose.

139 The Owners have failed to prove the necessity for the introduction of a rainhead and pop in this area and there is no allowance for it.

FINAL CLEAN

140 In the Scott Schedule Mr Thompson included \$1,000.00 for a final internal and external clean on completion. Final Cleaning is allowed for at item 34 of the specification, but the Owners have failed to prove that cleaning was necessary on the Builder's departure or that \$1,000.00 was incurred by them. There is no allowance for this item.

RUBBISH REMOVAL

141 The Owners claim \$120.00 for rubbish removal. I note that the Owners have an invoice for a two cubic meter bin, but I am not satisfied that it was for the purpose of removing rubbish left by the Builder. In particular, the photograph on the front of Mr Hay's report shows a number of tins which appear to be paint cans. There is no allowance for this item.

NEW HOSE REEL AND FITTINGS

142 The Owners claim \$30.00 for this item, but have not demonstrated a contractual or other entitlement to this sum. There is no allowance for this item.

LIGHT SWITCHES AND VANITIES

143 At paragraph 44 of Mr Kamay's witness statement he said that the sum of \$1,570.80 was deducted for light switches and fittings and a further sum of \$2,500.00 for two bathroom vanities. My task is not made easier by the failure of the Owners to include this claim in their defence and counter-

claim. Under cross-examination the Builder admitted these items had been provided by the Owners, but said in answer to a question about why he had not made allowance for them in his claim against the Owners “I was supposed to receive copies of invoices. I didn’t have invoices. I asked for them, but didn’t get them.”

144 No such invoices have been provided to the Tribunal either. In the absence of better evidence and pursuant to section 97 of the *Victorian Civil and Administrative Tribunal Act 1998*, and section 53 of the DBC Act, I find it is reasonable that the Builder should allow the Owners \$2,000.00 for these items.

CASH RETENTION

145 The cash retention is part of the sum that would otherwise be owing to the Builder if all work had been completed in accordance with standards of reasonable competence. It is not dealt with separately in the summary of accounts.

REPUDIATION

146 The Builder’s solicitors sent the Owners two letters concerning alleged repudiation, the first dated 26 July 2005 and the second dated 11 May 2005. The first recited the events concerning the list of 20 June 2005 and noted that access to the site to undertake works had been denied and also alleged that the Builder was told he was no longer to attend site. The letter stated “This conduct by you constitutes a repudiation of the Contract and our client reserves his right to accept that repudiation.” The letter went on to seek payment of \$28,284.23 within fourteen days, to notify the Owners that the Builder would be seeking the remainder of the cash retention at the end of the defects liability period and to state that the Builder remained ready, willing and able to attend to any matters requiring attention during the defects liability period.

147 The second letter, dated fifteen days later stated in part:

For the record, we now confirm that your repudiation of the building contract is accepted and, accordingly, all our client’s rights are reserved to claim loss and damage arising from the repudiation.

148 While I am satisfied that the Owner’s behaviour in refusing access to the Builder to complete was unreasonable, by that stage the relationship between the parties was difficult and I do not conclude that this was entirely due to the Owners. For example, the Builder had provided windows which were not in accordance with the contract and suspended work while this issue was resolved. The relationship also appears to have been soured by a mistake regarding the amount to be retained as cash retention which does not appear to have been the fault of either party.

149 It is noted that neither party addressed me on the effect of the alleged repudiation, but it is accepted that the contract was terminated on 11 May 2005.

CONTINGENCY

150 It is accepted that there was a contingency of \$5,000.00 in the contract, the whole of which the Builder acknowledged is to be allowed to the Owners.

SUMMARY OF ACCOUNTS, EXCLUDING INTEREST

151 The following have been derived from the reasons. All sums are inclusive of GST.

Contract sum	\$206,800.00
PLUS	
Certified variations	\$7,686.25
Post-architect variations	
Kitchen floor	\$860.00
Polish floor to study and corridor	\$495.00
Extension to retaining wall	\$462.00
Prime cost sum adjustment	
Kitchen bench top	<u>\$440.00</u>
	<u>\$216,743.25</u>
LESS	
Prime cost sum adjustment	
Door Hardware	\$1,650.00
Painting by Owners	\$15,436.00
<u>Completion and rectification:</u>	
Installation of antenna	\$240.00
Fly screen fit out	\$528.00
Termite spray	\$200.00
Schedule 1:	
Item 1 – Insulation, ceiling and walls	\$190.00
Item 2 – External laundry door jamb	\$226.00
Item 3 – Laundry window	\$239.25
Item 4 – Door stops	\$478.50
Item 7 – Timber floor	\$600.00
Item 9 – Bathroom 1	\$970.20
Item 10 – Plaster above door into hall	\$147.00
Item 11 – Ceiling to bedroom 1	\$1,000.00
Item 12 – Specified plaster sheeting	\$452.00
Item 13 – Kitchen cupboards	\$3,707.55

Item 16 – External side entrance door frame	\$207.46
Item 19 – Wall oven	\$253.00
Item 20 – Roof area	\$75.63
Schedule 2	
3.2 Flashing of roof over laundry	\$264.00
Item 4 – Damage to spouting	\$1,612.00
Schedule 3	
Item 2 – Rangehood	\$300.00
Item 4 – Kitchen benchtop around sink (wet area)	\$100.00
Item 5 – Provisional extra – soundproofing to bedroom 2	\$263.45
Item 6 – Vanity cupboard to bathroom	\$200.00
Item 7 – Brass strip to entry of bathroom	\$115.50
Item 9 – Sash cords to bay window	\$1,467.00
Item 10 – Tiles to rear porch	\$255.75
Item 11 – Retaining wall	\$154.00
Item 12 – Excess mortar to side of brick wall	\$120.00
Item 13 – Sill tiles to bay window	\$1,000.00
Item 14 – Second window order from Canterbury Windows	\$10,000.00
Item 15 – Non support to purlin over family room area	\$146.00
Light switches and vanities	\$2,000.00
Contingency sum	\$5,000.00
Amount paid	<u>\$166,006.25</u>
The Owners must pay the Builder	<u>\$1,138.71</u>

INTEREST UNDER THE CONTRACT

152 The nett amount owing by the Owners to the Builder fell due within seven days of the last claim, which was on 10 June 2005. As the contract had been terminated before that date, on 11 May 2005, the right to receive interest under the contract ended before interest became payable.

COSTS AND INTEREST

153 Costs and interest are otherwise reserved and there is leave to apply.

SENIOR MEMBER M. LOTHIAN